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Vol. VIII

TRANSCRIPT OF RECORD

(Pages 3451 to 3780)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 228

NYE & NISSEN (A CORPORATION), AND ABRAHAM MONCHARSH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

No. 11308

United States

Circuit Court of Appeals

For the Ninth Circuit.

NYE & NISSEN, a Corporation, and ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Ten Volumes

VOLUME VIII

Pages 3451 to 3780

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 561 Howard Street, San Francisco

(Testimony of Henry Eugene Berman.)

Q. How about Mr. Moncharsh? Did you ever see that gentleman use the stamp of the United States Department of Agriculture?

A. I certainly have not.

Q. Never in your lifetime?

A. Never have.

Q. Did you ever stamp or use the stamp of the United States Department of Agriculture or stamp cases when the inspector who gave you that stamp was not in your presence, or within some immediately vicinity of you?

A. No, they were always there.

Q. Did you ever see Mr. James Nix use the stamp when there was not the inspector who handed him the stamp in his immediate vicinity?

A. No, I did not.

Q. Did you ever see Mr. Menges use the stamp of the Department of Agriculture when the inspector who gave him that stamp was not there?

A. No, the circumstances would always be the same.

Q. And what are those circumstances again, please, in brief?

A. They would be stamped in the presence of the Department of Agriculture inspector.

Q. Mr. Andrade testified in this courtroom, Mr. Berman, that on one occasion where a certain lot of a thousand cases was prepared and delivered for the Navy, and a certain portion of that lot, consisting of 150 cases, was returned, that an [3189] inferior quality of eggs in an equal number of cases

(Testimony of Henry Eugene Berman.)

was stamped up by a counterfeit stamp in a transaction in which you helped to stamp them, and the eggs were then sent back to the Navy, and I will ask you if you ever participated in any transaction that even slightly resembled that transaction?

A. In no wise.

Q. Did you ever instruct anybody in your lifetime to use a spurious stamp of the Department of Agriculture, whether on Townsend Street or on Missouri Street?

A. I know of no spurious stamp of the Department of Agriculture.

Q. On the occasions when at the suggestion of the inspector of the United States Department of Agriculture, and to accommodate him, as you indicated in your testimony, you used this stamp, did that inspector indicate to you the cases that were to be stamped? A. Very clearly so.

Q. And did you follow out his instructions or requests? A. Implicitly.

Q. To the letter? A. Yes, sir.

Q. You know Mr. Oscar Nystrom, of course, don't you? A. Yes, I do.

Q. He did not work for you down on Townsend Street, did he? A. No, sir, he did not.

Q. So that we can get this time element correct, he was never an employee of Coast Egg Products Company, was he?

A. No. As a matter of fact, I believe Mr. Nystrom came to work for Nye [3190] & Nissen, Inc. in or about January, 1944.

(Testimony of Henry Eugene Berman.)

Q. And was he under your general supervision?

A. Yes, he was under my immediate supervision.

Q. Then he was one of your truck drivers, was he? A. Yes, he was.

Q. Did you at the same time have other truck drivers? A. Yes, I did.

Q. Approximately how many truck drivers were there, including Mr. Nystrom?

A. At that time, under my direct supervision, there were two other truck drivers at Missouri Street.

Q. And have you indicated to the jury and to his Honor that this would be approximately in the early part of 1944? A. Yes.

Q. Or did I give that testimony correctly?

A. That is right. He started his employ about in January, 1944.

Q. Generally speaking, what did Mr. Nystrom have to do?

A. Mr. Nystrom's main duties were deliveries to the waterfront, he made all the deliveries to our two retail outlets, he would deliver on occasion to some account I had in the East Bay area, and when time permitted he would take out some Safeway routes, at which time we were supplying those stores with some butter.

Q. What kind of truck did he use, Mr. Berman?

A. He had a small 1½ ton panel Chevrolet truck.

Q. The gentlemen of the jury will probably get a pretty good concept of that, but so that the ladies

(Testimony of Henry Eugene Berman.)

can be benefitted, about how many cases of these eggs we see around here, these [3191] usual egg cases, could be packed on that truck?

A. If nothing but eggs were being loaded into that truck, that truck would accommodate about 80 cases of eggs.

Q. And is that like one of these usual small trucks that you see around town with two doors that is entirely closed?

A. You can see the exact same truck in the first picture, the one that is No. 1 in line there.

Q. You are referring to Defendants' Exhibit CD? A. That is right.

Q. When you say the first truck in line, are you referring to the first truck immediately in the foreground of the larger truck?

A. That is right, the one with the picture of the Biddy Egg carton and the pound of Burdell butter on the outside of the truck.

Q. Mr. Nystrom, in making these various deliveries that you have indicated, would he segregate them in any particular way with respect to points of destination, or would he mix them up, or how would that be handled?

A. Well, they were supposed to segregate it.

Q. The deliveries were supposed to be segregated in the truck, is that correct?

A. Oh, yes, there were different types of merchandise.

Q. Upon any given truck delivery, would Mr. Nystrom have more than one order in that truck?

(Testimony of Henry Eugene Berman.)

A. Oh, invariably.

Q. And in the truck would he have orders of a different nature? [3192] In other words, would there ever be instances where there were civilian orders as well as non-civilian orders?

A. Just as many times as if there were not.

Q. In other words, the idea was to get the merchandise rolling, as they say, out of your plant, is that right? A. That is correct.

Q. Incidentally, during the year 1944, when Mr. Nystrom was with you, did you have a great deal of volume of operations? A. Exceedingly so.

Q. Were you under any handicap with respect to your method of distribution?

A. Yes, in many respects.

Q. Will you please explain to the ladies and gentlemen of the jury what handicap, what difficulties you operated under in your own particular division of Nye & Nissen at that time?

A. Well, we were extremely——

Mr. Pratt: What time was this, please?

Mr. Sullivan: In the early part of 1944 when Mr. Nystrom was present.

The Witness: Our help, such as Mr. Nystrom, were constantly rotating. Our automotive equipment was at a low point of condition. Our volume was far in excess of what we could conveniently handle.

Q. And did you have at that time any pressure with respect to the filling of purchase orders from

(Testimony of Henry Eugene Berman.)

agents of the War Shipping Administration, or those that said they were agents? [3193]

A. Yes, we did.

Q. And what particular pressure would there be?

A. Well, when they were amassing a convoy we had the purchase orders on hand; they would all want their deliveries at or about that same time, and they would all want them the first thing in the morning.

Q. Did you have difficulty in filling those requests during that period on occasions?

A. We got them filled, but not without difficulty.

Q. As a matter of fact, did you, yourself, Mr. Berman, ever do anything, personally, to fill orders? A. Many a time.

Q. And what, for example, would you do during that period?

A. There have been occasions when I have even been called at home on Sunday.

Q. Who would call you?

A. The various purchasing agents.

Q. What would they ask you to do?

A. They would inform me that a boat had just come in from the South Pacific. The boat had not had any butter, eggs or cheese for quite sometime, and they needed subsistence for the following morning, or for that very day, and would it be within my power to go down and get a couple of cases of eggs, a box of butter, a box of cheese, and see that it got to the boat in some way or other?

Q. Have you done that on occasions?

(Testimony of Henry Eugene Berman.)

A. Yes, I have done it on many occasions.

Q. Was there any personal difficulty with Mr. Nystrom? I will [3194] withdraw that question. Mr. Berman, I am going to ask you some questions about Mr. Nystrom, and I want you to know that in doing so I do not lay any emphasis upon an unfortunate condition he may have of hearing, but just to speak frankly, did you have any trouble with Mr. Nystrom because of his hearing?

A. Yes, decidedly so.

Q. How was that apparent?

A. Well, we would tell Mr. Nystrom to go over and get 40 cases of eggs for an order. He would come back with 30. We would tell him to get 6 boxes of cheese and he would come back with 5. His plea on those occasions, when it was called to his attention, was, "Well, you will have to talk louder. You know I am hard of hearing."

Q. Did you have any other difficulty with him generally with respect to his activities around the plant other than that which may be attributed to mere hearing?

A. Yes. Mr. Nystrom was not the best driver I ever had. He would very often assemble an order and leave a portion of the order behind and go out to make the delivery, and of necessity he would have to come back and pick up what was left of the order before he could get a signature for the balance of the order.

Q. Would you try to issue some admonition to him to correct that?

(Testimony of Henry Eugene Berman.)

A. Well, with kid gloves. Help was hard to get at that time.

Q. Did you feel, at any rate, that there was any improvement in his condition of working for you during the time that he [3195] was there?

A. No, I can't say that his condition improved at all.

Q. You were filling during the period that you were out on Missouri Street, the Coast Egg Products Company, up until December 31, 1943 and thereafter, the City Sales Division of Nye & Nissen had within their jurisdiction the filling of certain purchase orders, is that correct?

A. Are you referring to War Shipping Administration purchase orders?

Q. That is correct. A. Yes, we did.

Q. Will you just tell us generally how these orders would be handled?

A. Well, the orders would very often come in the mail showing either a delivery date in the near or immediate future, or showing that a time and a place would be set at some later date. I would put these purchase orders on my file in the rotation in which they came in, and not do anything about them until I received a specific instruction as to the delivery date, itself.

Q. Let us get this clear. On some orders do I understand your testimony to be a specified date would be immediately indicated on the face of the order? A. On some purchase orders, yes.

Q. And on others there would be language indi-

(Testimony of Henry Eugene Berman.)

cating that a date would be fixed after that, is that correct?

A. Yes, it would say, "Time and place of delivery at a later date."

Q. Now, whether the order indicated a specified time of delivery [3196] or whether the order indicated that there would be such a time designated later on, having in mind each of those situations, when did you proceed to fill that order?

A. Not until the day of delivery.

Q. Going back just a minute, when you say the order came in the mail, who physically would get that order out of the mail?

A. Sometimes I would get them, myself.

Q. Did you ever have in the course of filling these purchase orders from the War Shipping Administration or those that call themselves or the Government calls them their agents, did you ever have what you might call emergency orders?

A. Oh, yes, many times.

Q. Can you give us an example as to how these emergency orders would be differentiated from the other kind of War Shipping purchase orders?

A. Well, I am not clear as to what you mean by "emergency," Mr. Sullivan.

Q. I will put it this way, to make the question clearer: Were you ever furnished with a purchase order which, because of the conditions given either orally or in writing in connection with it, put you under a greater pressure to fill it than the other orders would?

(Testimony of Henry Eugene Berman.)

A. Well, yes, in this respect: Some boats would be in drydock for repairs, and at the time the order was placed the purchasing agent would inform me orally over the phone that they would most probably store their dry stores while the boat was in drydock, but that [3197] they would come to a designated pier for their refrigerator merchandise or the merchandise that had to go in their refrigeration, and that because of the shortage of space along the waterfront, they would only be at that particular dock for possibly a day or sometime less, and that for us to please have the merchandise available on short notice so that they may get into that dock and get the merchandise loaded and get within the specified time allotted them.

Q. Were you also faced with any situations that made more demands on you because of any secrecy that might attach to them?

A. Well, that I would not know. They would not disclose that information to me.

Q. Well, at any time were you ever advised that there was a secrecy to the particular purchase order or to the voyage to which it pertained, and that you would have to accommodate them in every respect with respect to immediate delivery?

A. All our business dealings were strictly confidential and kept within ourselves.

Q. Mr. Berman, during this period—let us say from the early part of 1944, when Mr. Nystrom was one of your employees—was there any partieu-

(Testimony of Henry Eugene Berman.)

lar specified time to which the loading of trucks began, so far as your department was concerned?

A. Well, they started work at either 7 or 7:30 in the morning, as the case may have been on that particular day, and I would load their trucks at the same time first in the morning. [3198]

Q. When you say you would load, do you mean you would personally load?

A. No, I do not mean that. I mean I would be there and they would be unloading under my supervision and direction.

Q. So there would be three trucks at the same time, is that correct?

A. Yes, that was true every morning.

Q. And they would from time to time come in and get other deliveries?

A. The same trucks?

Q. Yes. A. Oh, yes.

Q. How many times on an average, would you say, during these periods would each of the trucks come back and get another load?

A. Well, my city trucks were route trucks, and they would take out enough merchandise in the morning to fill their routes. Now, at times they might make a mistake in judgment of what to take, and they would go out on their route and come back for more merchandise during the day, but those instances were rare. However Nystrom was a special delivery man, and he would go out and make a delivery and come back and get more merchandise, go out and make another delivery,

(Testimony of Henry Eugene Berman.)

and that would be an incessant operation from beginning to end.

Q. And do I understand your testimony to be, then, that there was a continuous flow of business so far as you were concerned during the day?

A. Yes, there was.

Q. And in addition to the actual supervision of the loading of these trucks, what other duties did you have during the day?

A. Well, I was the manager of those two retail establishments [3199] we have talked about. They took quite a bit of my time. The phone was ringing incessantly. The steamship companies would call all day long, either to place orders or to place instructions for deliveries of orders, or to place what we call port orders for boats that were coming in and wanted merchandise right then and there. Various types of merchandise, as we all know, were very short during the war, and the civilian trade would be coming in and trying to get more merchandise allotted to them, or they would be calling. As a matter of fact, I spent a great deal of my time on the telephone, too much of it.

Q. Did you have to work overtime down at the Missouri Street plant during the early part of 1944?

A. Overtime is not the right word. We had no definite time. We came in and stayed until our work was completed.

Q. Referring to Mr. Nystrom—you heard him testify in this courtroom, didn't you, Mr. Berman?

(Testimony of Henry Eugene Berman.)

A. I did.

Q. Directing your attention to certain testimony of his that had to do with an unidentified lot of eggs being delivered to an unidentified ship at the Norton-Lilly pier in San Francisco on or about April 19, 1944, do you recall or do you remember that incident?

A. I can't remember that—any particular incident.

Q. With reference to this incident, Mr. Berman, Mr. Nystrom testified that you directed him to get a lot of 38 cases of eggs [3200] on this delivery, which embraced 48 cases, and then you told him to get 10 cases, which were not stamped with the Department of Agriculture stamp, and you then told him to mix those 10 unstamped cases among the stamped cases in his truck. Did you ever do anything like that?

A. No. Quite to the contrary. I very often admonished Mr. Nystrom to make sure that all the cases he put on his truck in reference to War Shipping Deliveries were stamped.

Q. Did you ever tell him, for instance, how to place cases on his truck?

A. If I did it would be because there might be some wooden cases and fiber cases in the same load.

Q. And when that condition existed what instruction did you give him?

A. Well, we were using some pretty bedraggled cases at that time, of necessity, and if there were

(Testimony of Henry Eugene Berman.)

any wooden cases and fiber cases in the same load, we always tried to get the wooden cases on the bottom of the load because they would hold up best.

Q. Did you give those instructions to Mr. Nystrom?

A. I gave those instructions to anybody who made a delivery at that time.

Q. Other than those instructions, did you ever at any time tell Mr. Nystrom to take some unstamped cases and mix them up so they would not be seen among stamped cases on any given load?

A. I did not.

Q. I think you told me you do not even recall a delivery to [3201] the Norton-Lilly dock.

A. No, I can't pick out any particular delivery.

Q. Mr. Nystrom testified also that right after this first occasion, Mr. Berman, that I called your attention to, there was a second delivery going to the other end, as he put it, of the Norton-Lilly dock, consisting of the same number of cases, 48 cases, and that he had it loaded on a truck, and after he had it loaded you telephoned him to come down in the morning because the Army was coming to inspect them, and after he came down in the morning you said, in substance, "When the Army points to some of those cases and they point in just a general direction, Mr. Nystrom, you take a case that is stamped and not a case that is unstamped." Do you recall anything even remotely resembling that incident?

A. Yes, I believe I recall an incident where eggs

(Testimony of Henry Eugene Berman.)

were loaded for a delivery and we then found out that they had to be Army inspected before they would be accepted at the dock.

Q. Do you recall where that delivery went?

A. It would be imposible for me to say that.

Q. Do you recall telephoning Mr. Nystrom in connection with coming down on a delivery of that sort?

A. I can't remember a specific phone call. I have at different times called my boys at home to be in a little earlier in the morning due to the press of business.

Q. As a matter of fact, was that necessary due to the [3202] exigencies of the times at that time, Mr. Berman? A. Very much so.

Q. Did you ever, on any shipment to the Norton-Lilly dock, tell Mr. Nystrom or anybody else to take some unstamped cases and mix them with stamped cases?

A. To the Norton-Lilly dock or any other dock those were never my instructions.

Mr. Sullivan: I have reached a breaking point in this examination, if the Court please.

The Court: The jury will keep in mind the admonition of the court and return at ten o'clock tomorrow morning.

(An adjournment was thereupon taken until tomorrow, Thursday, March 21, 1946, at ten o'clock a.m.) [3203]

Thursday, March 21, 1946, 10:00 o'clock a.m.

The Clerk: United States vs. Nye & Nissen.

The Court: Waive the roll call, stipulating and agreeing all the jurors are present. You may proceed.

HENRY E. BERMAN

recalled.

Direct Examination (Resumed)

The Court: You may proceed.

Mr. Sullivan: Your Honor, may I have the board on which the pictures are affixed moved back to the position we had it yesterday?

The Court: Yes. Proceed.

Mr. Sullivan: Q. Mr. Berman, I was asking you yesterday about a delivery of eggs that was testified to by Mr. Nystrom in which he stated that a delivery had been prepared for the Norton Lilly dock and thereafter that you had telephoned him in the evening and there was some mention about an Army inspection to be made the following morning. You testified that you recalled an incident of that sort but you do not remember Mr. Nystrom being connected with it. Now, I will ask you at this time just what do you recall about any incident that resembled the incident mentioned by Mr. Nystrom?

A. In that particular respect I do remember an order being [3204] prepared for an early delivery at the request of the shipping company to some dock along the Bay area; what dock and what company were involved and the name of the boat I

(Testimony of Henry E. Berman.)

can't recollect, but I do know that after the load was assembled and put on the truck and the truck was put into the garage for the night so as to enable us to make an early morning delivery on this particular vessel I received a call from either the port steward or the purchasing agent of this particular company. I don't recollect where I got the call, at the office or home, whether I received the call at home, because very often I did receive communications from various companies at home outside of the regular course of business in reference to deliveries at odd times and requests for deliveries at early morning periods or even after the close of business. In this particular incident whoever had phoned the order or placed the order with me had neglected to state that the merchandise for that boat had to be Army inspected as well as Department of Agriculture inspected, because that particular boat had troops aboard and it was a practice of the Veterinary Corps to request inspection for all perishable foodstuffs where United States Army troops were involved and would I please make the arrangements for the inspection and also see to it that if possible these arrangements would not hold up the delivery in the morning so the boat still could get the merchandise down there at an early time. [3205]

Q. Did you do that? A. Yes, I did.

Q. Was there on the load that you assembled any unstamped cases of merchandise; by that I mean cases of merchandise that did not have the

(Testimony of Henry E. Berman.)

United States Department of Agriculture stamp on them? A. No, there was not.

Q. Did you ever in connection with that load that you recall give any instruction to anyone to put unstamped cases with that load?

A. At no time were those instructions given.

Q. With respect to the subsequent inspections by the Veterinary Corps, did that happen on some occasions with merchandise being sold by your company?

A. Yes, on occasion where it was so required.

Q. Do you recall on this occasion having requested the witness Nystrom to assist you, do you remember him?

A. I don't know whether it was Nystrom or some other driver.

Q. Mr. Berman, yesterday when I asked you about these exhibits here I wanted to ask you a few questions about the pictures of the premises. Would you step down to the board? We have been talking about a couple of instances here and we mentioned the loading of trucks. Will you point to any of those exhibits there and illustrate where the trucks were usually loaded at 17th and Missouri Street plant during the time we have been talking about?

A. You mean the trucks in which I was instrumental in loading? [3206]

Q. Yes.

A. These two apertures here were for the trucks under my jurisdiction. I could place two trucks side by side at the farthest one.

(Testimony of Henry E. Berman.)

Q. That is the center one would accommodate one truck and there you could accommodate two trucks (indicating)? A. Yes.

Q. Is that where the commodities that were being distributed by City Sales were usually loaded on the trucks that you had under your jurisdiction?

A. Usually, but not in all cases.

Q. In other words, during a rush period would you avail yourself of other loading space?

A. Very often when the entire front was blocked and busy, there was a side door on Missouri Street and we could open a side door with an overhead—it was an overhead rolling door and we could bring a truck into that portion and load from the side of the plant, but not as conveniently as loading there, but on occasions it could be utilized.

Q. Would you put a little mark there on the first doorway of the two apertures and mark "b-4" to indicate the portion of the premises at Missouri Street and put a "b-4" over one doorway and also a "b-4" over the second aperture to indicate the place where your trucks were usually loaded? May the record show the witness has marked in two places over two doors on Defendants' Exhibit CD in evidence the figures "b-4" to identify the portion where his trucks were usually backed up for loading purposes? [3207] Now, Mr. Berman, just so the Jury can get the full picture here, I will direct your attention to Defendants' Exhibit CD in evidence and ask you what this portion is for?

(Testimony of Henry E. Berman.)

A. That is the entrance to the main portion of the plant.

Q. Can you tell the Jury just where with respect to that picture there where the executive offices of the company or the business offices are?

A. Well, this portion here is the 17th Street side and our executive offices run in the rear of the plant from the Missouri Street side the width of the building. To better illustrate that, this portion here would come out in back of this candling booth you see here and you would have to go the length of the plant here to the far corner and up a flight of stairs in this corner to our main offices. They would be on a higher level.

Q. What we see in Defendants' Exhibit CD would generally speaking be the ground level of the building?

A. That is the working premises.

Q. Are the business offices at another level?

A. Yes, they are one story higher.

Q. As I understand your testimony, the street immediately to the left of the extreme left of this exhibit is Missouri Street? A. Yes.

Q. Then this plant is on 17th Street at the corner of Missouri? A. Yes. [3208]

Q. We go on then to another street. What is the name of the other street going toward Potrero?

A. Connecticut.

Q. You mentioned, Mr. Berman, a small portion which you pointed out to the ladies and gentlemen of the Jury on Defendants' Exhibit CD as coming

(Testimony of Henry E. Berman.)

out near a scale which appears in the photograph, Defendants' Exhibit CH in evidence. I will ask you to look at Defendants' Exhibit CH and tell the Jury generally what this area here is in the plant on 17th Street.

A. This is Mr. Goddard's shipping office with a room upstairs where supplies are kept.

Q. You mentioned here a booth. What is that booth?

A. That is a candling booth that we had made at the expressed desires and for the expressed purpose of all inspectors that came into our plant to inspect merchandise.

Q. That was a service, a courtesy extended to them, wasn't it? A. Yes.

Q. In other words, did your organization do your commercial candling, usual candling there?

A. No, we did not.

Q. Is it possible to show the Jury on any of these pictures where with respect to the ground floor of the plant the candling room would be?

A. Yes. It is shown very clearly, this is the portion in back of these doors that show here.

Q. You are looking at and pointing to Defendants' CF in evidence? A. I am.

Q. Will you show the ladies and gentlemen of the Jury the [3209] general candling room area on 17th Street and Missouri Street as that appears there?

A. Yes. It is this portion against the walls

(Testimony of Henry E. Berman.)

where the open transoms where, where they can be seen (indicating).

Q. Will you mark that with the designation "b-5"? May the record show the witness has marked Defendants' Exhibit CF with the figures "b-5" to designate the candling room area on the Missouri Street plant?

Now, Mr. Berman, is it possible on any of these exhibits that you see here affixed to the board to show the Jury, where generally your office was during the year 1944?

A. Well, you can just faintly see the outline of a corridor in back of these cases of eggs. There is a very small area in there in which I had a desk and phone.

Q. That is CG in evidence you have just pointed to. Will you put a little arrow immediately over the portion you pointed out as your office and mark it with the figure "b-6"? May the record show the figure "b-6" designates his office on this picture which is CG in evidence for the defendants. I noticed a sort of rail or balustrade in that area there, is that correct? A. Yes.

Q. About how big would that office space be there, just roughly? A. About six by six.

Q. It contained a desk? A. Yes.

Q. Where with respect to the first of the loading areas that [3210] you have designated as "b-4" in the area that you have designated as "b-6"?

A. It is right under the furthest window.

Q. So looking at Defendants' CD in evidence,

(Testimony of Henry E. Berman.)

you are at the extreme right of the plant, of the front of the plant? A. Yes.

Q. Then, as I understand the testimony, this door at the left of this picture here enters Mr. Goddard's office?

A. No, it doesn't enter Mr. Goddard's office. It enters a corridor in the back of Mr. Goddard's office.

Q. But it is generally in the vicinity of Mr. Goddard's office, is it?

A. Yes, Mr. Goddard's office is in back of these windows here.

Q. So that generally speaking, Mr. Goddard's office is in the general area to the left of this picture and your office is in the general area to the right of the picture? A. Yes.

Q. In between your two respective offices do I understand your testimony to be is this loading area? A. Yes.

Q. In between your respective offices would you say that generally speaking there was this area of floor space where the inventory was stacked, is that correct?

A. Yes. This picture was taken standing almost directly in this—in this portion of this opening here and looking toward the back of the plant slightly on a slant towards Missouri Street.

Q. Thank you. Would you go back to the stand, please? Now, we had about developed yesterday in the testimony, Mr. Berman, [3211] the manner in which these purchase orders that came into the

(Testimony of Henry E. Berman.)

plant came to your office that were subsequently filled. I think we got to the point where you said that you either took them out of the mail or they were mailed and you got them. Now, I would like to have you described to the Jury what followed with respect to the filling of these purchase orders. Let me ask you this question: When you received the purchase order, I understood you to say that there would be either a definite statement made with respect to delivery or the delivery would be left open; is that correct? A. That is correct.

Q. Can you give the Jury an illustration when a *definite was* made as to the delivery on the purchase order?

A. I don't think I clearly understand your question.

Q. Let me put the question this way; would the purchase order itself name a specific delivery date on instances? A. On instances, yes.

Q. Would that date be reasonably close or would it be at some distant time or did it vary?

A. It varied.

Q. If the order did not name a specific date what would be done?

A. Time and place of delivery may be designated at a later time.

Q. How would the time and place of delivery be determined? A. Over the phone.

Q. Who would designate time and place of delivery? A. Anyone of a number of people.

Q. Who would they contact of your organization?

(Testimony of Henry E. Berman.)

A. Either myself or the girl at the switchboard.

Q. Would the girl at the switchboard on occasion transmit the information to you?

A. When she had the information.

Q. Now, you have a purchase order and you have, say, a fixed delivery date in either the purchase order or by telephone. What do you do about filling that purchase order?

A. I don't do anything about it until the day of delivery.

Q. The date of delivery would be fixed either by the phone call or the purchase order?

A. That is correct.

Q. Then assuming that the date of delivery has arrived, what do you do?

A. Well, on the day of delivery I have at hand a pretty accurate picture of what the activities may be for that day according to the press of business, whether it is going to be an extremely busy day or one where we can follow the normal procedure as to the way our orders would be handled. At the inception of this War Shipping business as respects the assembling of the orders pertaining to butter or cheese I at first would physically assemble the butter and cheese for that particular vessel. By that I mean I would have a flat on a dolly and if that order called for ten boxes of butter I would get those ten boxes of butter and put it on the flat; if it called for three cases of Cheddar Cheese I would get three cases of Cheddar Cheese and put it on the flat. If it called for processed cheese I

(Testimony of Henry E. Berman.)

would get the specific [3213] number of packages and put them on the flat, or whatever else may have been called for on that order, I would assemble it all on one flat. I would then take the weights of the various packages and make my hand tags from that information. It wouldn't at that time be necessary for me to do the same thing with the eggs because more often than not we had a large inventory or a stockpile of eggs there and at the actual time of loading the truck it would be very easy to instruct the driver to go over and get so many cases of eggs. [3213-a]

Q. Now, during the time that you were adopting and following that practice, Mr. Berman, what documents did you, yourself, prepare in connection with any of the transactions?

A. I prepared two duplicate sets of invoices or a counterpart of an invoice. One was actually a City Sales invoice, the other was what I termed a hand tag.

Q. Did those two sets of documents that you have described set forth in detail the merchandise on that order?

A. Everything, even as to pertaining to price.

Q. Did you write what they call the extensions, for instance, on the order?

A. No, I never made an extension.

Q. What is an extension?

A. The extension is the quantity multiplied by the price.

Q. So that is the full amount that you charged a person, is that correct?

(Testimony of Henry E. Berman.)

A. That is correct.

Q. You did not do that? A. No, I did not.

Q. But you wrote out two sets of hand tags, to put it roughly, upon which appeared the merchandise in detail, is that correct?

A. That is correct.

Q. And then were there any other documents written or prepared in connection with that order?

A. Yes, there were the given amounts of typewritten invoices that were necessary to accompany the shipment to the dock.

Q. Was that a constant amount or did it vary?

A. It varied from four to fifteen copies. [3214]

Q. Depending on what?

A. The request of the shipping company.

Q. And did you always comply with that request?

A. I even went beyond that. I always had a couple of extras made.

Q. After you had your hand tags prepared—they were in longhand were they?

A. Yes, my hand tags were always written out by myself.

Q. Who prepared the invoices?

A. Whoever was upstairs. Most of the time it was Trini Robles.

Q. That was the young lady who appeared here in court? A. That is right.

Q. How would she prepare them?

A. She would typewrite them with the information from my hand tags.

(Testimony of Henry E. Berman.)

Q. Where would she get them?

A. From me.

Q. Did you go upstairs and give them to her?

A. Not all the time.

Q. How would they get there?

A. She would either come down for them if we were busy or I would send a driver up with them, or I would hand them to anybody who happened to be going up to the office.

Q. You said you had a certain practice but you did not always follow that practice, is that correct?

A. No, I did not.

Q. How did you change the practice?

A. Well, when we were busy, and at times the intense activity reached a pitch where it would be physically impossible for me to assemble the merchandise for these various deliveries and still take care of [3215] everything else that had to be taken care of by myself in that plant—I had no assistants in my department, whatsoever. On cheese particularly I would take the range of weights. By just looking at a flat of cheese I could tell what an easy common denominator would be for that particular shipment. In other words, if I looked at a flat of cheese and they were Cheddar Triplets, and I could see at a glance they ranged from 75 to 85 pounds per case in denominations of half a pound up—in other words, they could be 75, 75½, 76 pounds, and all the way up—I could take a common denominator, and if the order called for two cases of Cheddar cheese or 150 pounds of Cheddar cheese,

(Testimony of Henry E. Berman.)

three cases or 250 pounds, I would use that to get the closest aggregate total of the cheese called for of that particular type in that order.

Q. In other words, do I understand that before you began the physical writing of the hand tag on this second practice that you adopted, during the intense and the strenuous months in the War Shipping business, that you consulted your inventory or what ever cheese was available out on the plant floor? A. That is right.

Q. Was the cheese usually out there on the plant floor? A. More often than not.

Q. Where was it with respect to your office?

A. It would be in any one of a number of places.

Q. The cheese, as I understand, had weights stamped on it, did [3216] it?

A. Sometimes more than one.

Q. But they did have some kind of weight on there? A. That is right.

Q. And the cheese would be piled how?

A. They would be piled on flats.

Q. So you would look over an entire flat or set of flats, would you? A. That is right.

Q. And then having reached an idea, a determination of what the range of weights was on the cheese, did you have somebody, or did you, yourself, select the cheese when the invoice was written out?

A. Well, we wouldn't actually touch the cheese until everything else was loaded on the truck for that particular delivery, because eggs were always

(Testimony of Henry E. Berman.)

loaded on the truck first, then butter, and then cheese.

Q. How would you handle the cheese?

A. I had the invoice at hand, and whoever was assembling this load for the delivery and the loading, I would inform him, "Go over to the pile of cheese and get three cases of cheese aggregating a total of 240 pounds," or "Two cases of cheese to come to 150 pounds," or whatever the common denominator I would be using at that time. It would vary.

Q. Let us take, as an illustration, Mr. Berman, during the period that Mr. Nystrom was there, did you have occasion to hand him the hand tag that you had prepared when a load was going out?

A. On occasion, yes. [3217]

Q. When you were having Mr. Nystrom go out with the load, what did you do normally? Suppose he was going to bring some eggs up, for instance; what would you do?

A. Well, I would have the hand tag—if all I was doing was taking care of Mr. Nystrom for that particular delivery and had nothing else to do at the moment, I would have the hand tag and at my fingertips or in my possession, and I would start with the eggs. Whatever was called for I would say, "Oscar, go over and get 48 cases, or 50 cases," or whatever the case may be, of stamped eggs, and I would point where to go.

Q. And then did you bother any more with him on that particular assignment of eggs?

(Testimony of Henry E. Berman.)

A. Not until he had them all assembled and loaded in his truck.

Q. An then what would you tell him with respect to butter?

A. Well, at that time we were particularly busy. The easiest way for us to handle butter, and the way we actually did it, was in the morning Mr. Goddard would get the information of how much butter would be required, either for the day or up to a given period in that day, and he would bring out on the floor from the cooler, a flat, or two flats, or three flats, whatever was necessary, of butter, and leave it on the floor somewhere within easy distance of the loading platform, and that would remain there, and if the order called for 10 boxes of butter we would say, "Oscar, go over and get 10 boxes of butter off that flat."

Q. What would you say with respect to the cheese, having in mind the practice that you described during the days when you were under this intense strain?

A. Whatever the order called for we would say, "Oscar, go over——" or whatever the driver was; it didn't necessarily have to be Oscar—"go over and get 5 cases of Cheddar Loaf cheese that will scale 150 pounds. Get two cases of Cheddar *Chips*, 160 pounds," or whatever the case may be.

Q. At the time you told him to do those things, Mr. Berman, did you already have that invoice written up?

A. Yes, the invoice was already prepared.

(Testimony of Henry E. Berman.)

Q. So that you assumed he would follow your directions, is that correct? A. Naturally.

Q. In the former practice, before the intense business of War Shipping reached its peak, when you were selecting actually physically selecting the cheese, yourself, how would you write the invoice out?

A. I would write the invoice after I had everything assembled, just by adding up the various weights.

Q. So that as I understand your testimony, during this particular period, by virtue of the exigencies of the time, you were forced to adopt this other convenient measure, is that correct?

A. There was no other way we could get the work out.

Mr. Sullivan: Mr. Clerk, may I have U. S. Exhibit 65? Will the Court indulge me for a few minutes, please? [3219]

Q. Mr. Berman, there has been some testimony here about a shipment of eggs to the William S. Clark. Did you have anything to do with that delivery of eggs?

A. No. As a matter of fact, until I came to court here the William S. Clark meant nothing to me, the name, itself.

Q. Your department did not handle that at all?

A. No, it did not.

Q. Do you recall whether your department, the City Sales, of Nye & Nissen, handled a shipment of

(Testimony of Henry E. Berman.)

certain butter, eggs and cheese to the steamship John Muir on April 24, 1944? Do you recall that?

A. I can't recall that offhand. I have heard the name mentioned here.

Q. You have heard it mentioned in court?

A. Yes, I have.

Q. Is this just one of many transactions to you?

A. That is right.

Q. I will show you United States Exhibit in evidence No. 65, being addressed to the United States War Shipping Administration, Alaska Packers Association, in connection with the steamship John Muir, and ask you if you recognize that.

Mr. Pratt: What is the number of the exhibit?

Mr. Sullivan: 65.

A. Yes, very apparently it is one of the shipments handled by myself.

Mr. Sullivan: Q. Do you have any specific recollection of this specific document?

A. No, we handle lots of documents [3220] in our place.

Q. Now, you talked here about an invoice that was prepared by the girl upstairs, usually Miss Robles. Would that U. S. Exhibit 65 be illustrative of the invoice you have reference to?

A. Yes, it looks like that identically.

Q. If I understand it, to prepare that invoice you had first prepared a couple of hand tags, as you called them? A. That is right.

Q. Mr. Faulkner has just called my attention to United States Exhibit No. 64, which is a pur-

(Testimony of Henry E. Berman.)

chase order dated April 10, 1944, for the steamship John Muir. Mr. Berman, I will show you United States Exhibit No. 64 and ask you if you can identify that purchase order.

A. It is a physical purchase order from the Alaska Packers Association. I will say that.

Q. Would that have passed through your department, to the best of your recollection?

A. Yes, it probably would have. However, this purchase order is typical of some of the purchase orders about which we have been speaking. It says, "Delivered to," and then it says, "Will advise." Now, very often a purchase order would not reach us until sometime long after the actual delivery had been made.

Q. You mean after you had sent the goods out you would get a purchase order like that?

A. That is right.

Q. Did that happen on many occasions?

A. Oh, yes. [3221]

Q. What was the reason for that, if you know?

A. They would place the order over the phone, and I imagine that due to the press of business in their own office, the purchase order would be held up in their works.

Q. After the receipt of the purchase order, assuming that this is an instance where it might come in before the delivery, you then prepared a hand tag, is that correct?

A. Not until I actually had the day of delivery.

Q. That is what I mean. A. Yes.

(Testimony of Henry E. Berman.)

Q. You, subsequent to that but on the date of delivery prepared a hand tag?

A. That is correct.

Q. I will show you a document upon the printed bill head of Nye & Nissen, City Sales, bearing a stamp number 15263, dated April 24, 1944, and addressed to the United States of America, War Shipping Administration, Alaska Packers Association, and I will ask you if you recognize that document. A. Yes, that is in my handwriting.

Mr. Sullivan: May I have this marked as Defendants' Exhibit next in order for identification?

The Court: It may be admitted and marked.

(The document was marked Defendants' Exhibit CJ for Identification.)

Mr. Sullivan: Q. You gave this document to me before we came to court, or gave it to Mr. Faulkner at sometime, didn't you?

A. I may not have. [3222]

Q. That is correct; in other words, to the best of your knowledge it came from the files of your company?

A. It came from the files of our company very definitely, yes.

Q. Showing you Defendants' Exhibit CJ for Identification, I will ask you is that document in your handwriting? A. Yes, it is.

Q. Is there any exception to your statement that the document is in your handwriting?

A. Well, the document, itself—I see it bears a signature and a pencil check mark—in fact, it has